UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Zaclon, Incorporated,	)	
Zaclon LLC, and	)	
Independence Land Development Company,	)	**Docket No. RCRA-05-2004-0019**
	)	
Respondents	)	

ORDER DENYING COMPLAINANT'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

I. Background

The Complaint in this matter, filed by Complainant, United States Environmental Protection Agency Region 2, on September 29, 2004, charged Respondent Zaclon Incorporated with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* by storing hazardous wastes without a permit. Specifically, the Complaint alleged that Zaclon Incorporated owns and operates a facility at which sash and baghouse dust were stored without a permit or interim status for at least six years prior to an inspection on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45.

An Answer to the Complaint was filed on November 2, 2004, denying the alleged violation. After unsuccessfully engaging in Alternative Dispute Resolution, the parties filed their prehearing exchanges requested by a Prehearing Order. Complainant moved to amend the Complaint to add Zaclon LLC and Independence Land Development Company ("ILDC") as Respondents to the Complaint.[1] Thereafter, Complainant moved to file a *Second Amended Complaint*, based on information Complainant received after the Prehearing Exchange from an inspection of Respondents' facility, adding allegations that Respondents illegally received, stored and treated hazardous waste, namely spent stripping acid, in violation of RCRA. By Order dated October 7, 2005, the requests to amend were granted, and the Second Amended Complaint was filed on October 14, 2005 (hereinafter referred to as "Complaint").

Complainant filed a Motion for Accelerated Decision on Liability as to Count 1, which was granted on November 3, 2005. The hearing in this matter was scheduled to commence on

[1] Zaclon, Inc., Zaclon LLC, ILDC are hereinafter collectively referred to as "Respondents" or "Zaclon."

May 16, 2006, and a deadline of February 24, 2006 was set for pre-hearing motions, such as motions to amend. Several motions were submitted, including Complainant's Motion for Leave to File *Third Amended Complaint*, filed on February 24, 2006 (Motion). Respondents submitted an Opposition to the Motion on March 10, 2006, to which Complainant filed a Reply on March 23, 2006.

II. Arguments of the Parties

Complainant seeks to further amend the Complaint to add two additional individual respondents, James B. Krimmel and Joseph Turgeon, on the basis that they are both "operators" of a RCRA facility, as defined in 40 C.F.R. Section 260.10, and are thus liable for the actions of the facility whose operations they direct and oversee, and over which they exercise complete control. Complainant points out that Section 3005(a) of RCRA authorizes the promulgation of regulations requiring "each person owning or operating an existing facility . . . for the treatment, storage, or disposal of hazardous waste . . . to have a permit . . .," and in the regulations promulgated pursuant thereto, 40 C.F.R. Section 260.10 defines the term "operator" as "the person responsible for the overall operation of a facility." Complainant argues that this definition allows both a corporate entity and an individual to be held liable as "operators", citing to *United States v. Environmental Waste Control*, 917 F.2d 327 (7th Cir. 1990). Complainant asserts that Mr. Krimmel and Mr. Turgeon are the founders of Zaclon and are the President and Chief Executive Officer of Zaclon, respectively, and jointly own all of the Zaclon entities (Alpha Zeta Holdings, Inc. and its subsidiary companies Zaclon LLC and Independence Land Development Company). Complainant points out Mr. Turgeon's resume states "Joe [Turgeon] and Jim [Krimmel] have successfully operated Zaclon since 1987." Respondents' Prehearing Exchange Exhibit ("Rs' Ex") 12. Citing to documents in the Prehearing Exchange, Complainant asserts that Mr. Krimmel and Mr. Turgeon make or approve all key decisions, negotiate agreements, and sign letters as to Zaclon's operations, including those which gave rise to the alleged violations.

In the Opposition, Respondents argue that Complainant unduly delayed filing the Motion, as Complainant knew since the original Complaint was filed that Mr. Krimmel and Mr. Turgeon were the primary officers of Zaclon and signed correspondence and appeared at meetings on behalf of Zaclon. Respondents assert that if the Motion is granted, the hearing will need to be postponed, as Respondents would need to file an answer to the proposed Third Amended Complaint, and intend to take an opportunity to file a motion for accelerated decision as to liability of the corporate officers. Respondents urge that delay would be prejudicial because the use of stripping acid in their production process is a crucial part of their operations, and they deserve a quick resolution of this case so that they do not operate in regulatory limbo and can make any necessary changes in operations.

Respondents argue further that the proposed amendment would be futile because it is rare for a corporate officer to be an operator under RCRA, citing *Southern Timber Products*, 3 E.A.D. 880 (EAB 1992), and Mr. Krimmel and Mr. Turgeon will submit sworn evidence to support a motion for accelerated decision. Respondents assert that the facility at issue is owned

and operated by corporate entities, and that there is no basis to pierce the corporate veil to hold the corporate officers liable. The facility has 34 employees, including a plant manager, production manager, regulatory compliance manager, and customer service manager, and at least six other individuals who operate processes which are RCRA regulated. Respondents argue that it is not the intent of Congress and it is contrary to case law for every responsible corporate officer of any small business to be deemed an operator under RCRA. Respondents assert that a substantial amount of Mr. Krimmel's and Mr. Turgeon's time is not spent at the facility at issue, neither are the sole shareholder, neither has owned or leased the property in their personal capacity, and there are no documents identifying either as a facility operator.

In its Reply, Complainant asserts that after the original Complaint was filed, it spent half a year in Alternative Dispute Resolution with Respondents, that in its Prehearing Exchange, EPA gave notice to Respondents that Complainant was considering amending the Complaint to add Mr. Krimmel and Mr. Turgeon as operators of the facility, and that since then, Complainant issued information requests and investigated to confirm that they exercise "the sort of untrammeled, plenary command and control of all Zaclon's operations requisite to support a holding . . . that [they] are jointly and severally liable as operators of the facility." Reply at 3. Complainant argues that it did not act rashly or hastily in seeking to amend the Complaint but acted "circumspectly and prudently, . . waiting until the evidence has become overwhelmingly clear." *Id.* Complainant adds that the Motion met the prehearing motions deadline. Complainant doubts that the hearing would need to be delayed, just for the two officers to deny that they are operators of the facility in an answer and to offer sworn affidavits to that effect. Complainant points out that each of the two officers hold a 50 percent share in each of the companies, and argues that an officer's delegation of responsibilities shows that he controls the activity and responsible for it. Complainant lists several alleged facts regarding the control Mr. Krimmel and Mr. Turgeon had over the facility, in support of its argument that they are "operators" of the facility.

III. Standards for Motion to Amend a Complaint

The Rules of Practice, 40 C.F.R. Part 22 ("Rules") provide at section 22.14(c) that "the complainant may amend the complaint only upon motion granted by the presiding officer, but no standard is provided in the Rules for determining whether to grant an amendment. The general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). Motions to amend an administrative complaint are analyzed under the standard applied in Federal court for amendment of pleadings: "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant ... undue prejudice to the opposing party ... [or] futility of amendment," leave to amend pleadings should be allowed. *Foman v. Davis*, 371 U.S. 178, 181-182 (1962).

The most significant of these factors is whether the amendment would unduly prejudice the opposing party. *Carroll Oil Company*, RCRA (9006) App. 01-02, 2002 EPA App. LEXIS 14

* 38 (EAB, July 31, 2002). Undue prejudice may exist even where the motion to amend is filed before the deadline for filing such motions. *Id.* (ALJ did not abuse discretion in denying motion to amend complaint to add the president of the corporate respondent and a related company as respondents, where motion was filed within motions deadline but only six weeks before the hearing, which would need to be postponed if amendment was granted). Undue prejudice has been described as follows:

> Undue prejudice exists where the prejudice outweighs the moving party's right to have the case decided on the merits. In balancing these interests, the court should consider the hardship to the moving party if the request to amend is denied, the reasons for the moving party's failure to include the information in the initial pleading, and the harm to the opposing party if the motion is granted. Examples of circumstances of "undue" prejudice include that the motion to amend comes on the eve of trial after many months or years of pretrial activity, would cause undue delay in the final disposition of the case, brings entirely new and separate claims, new parties, or at least entails more than an alternative claim or change in the allegations of the complaint, and would require expensive and time-consuming discovery.

Boyd v. Illinois State Police, Civ. No. 98C 8348, 2001 US. Dist. LEXIS 8899 *7-8 (N.D. Ill. June 27, 2001).

Hardship to the moving party, weighing in favor of granting a motion to amend, has been shown where the party would be unable to obtain satisfactory relief if the request to amend were denied. *Id.* (motion to amend to add individual defendants granted where movant's explanation of delay was insufficient, but no inordinate discovery would be required and denial of motion would harm movant because it would not be able to obtain punitive damages); *Cameco Industries v. Louisiana Cane Manuf'g*, Civil No. 92-3158 Section R, 1996 U.S. Dist. LEXIS 471 * 3-4 (E.D. La. Nov. 16, 1996)(motion to amend to add as defendants officers of corporate defendant granted where plaintiff alleged recent discovery that corporate defendant may not be financially able to satisfy judgment, and where continuance of hearing not needed, no new discovery required); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 339-40 (7th Cir. 1974)(motion to amend complaint to add as defendants officers, directors and shareholders of corporate defendant granted where they were on constructive notice of the action and were active participants, and where "exceptional situation" existed, namely alleged use of corporation as a vehicle to violate civil rights, that was sufficient to justify disregard of the corporate identity). However, the mere fact that the corporation may not be able to pay the penalty may not be sufficient to establish such hardship. *Cartier v. Four Star Jewelry Creations, Inc.*, Civ. No. 01-11295(CBM), 2004 U.S. Dist. LEXIS 989 (S.D. N.Y. Jan. 27, 2004)(the possibility that the corporation cannot pay the judgment attends every litigation). The movant's knowledge earlier in the proceeding of the possibility that sufficient relief may not available against existing parties may weigh against granting a motion to amend to add a corporate officer. *Carroll Oil*, 2002 EPA App. LEXIS 14 n. 16 (in denying EPA's motion to amend, tribunal considered that EPA knew at the time corporate respondent filed its answer that inability to pay may be an issue).

Harm to the opposing parties, or prejudice, weighing against granting a motion to amend, may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party. *Carroll Oil,* 2002 EPA App. LEXIS 14 * 42. As quoted by the Environmental Appeals Board (EAB), "Parties to litigation have an interest in the speedy resolution of their disputes without undue expense. Substantive amendments just before trial are not to be countenanced." *Id.** 40-41 (quoting *Feldman v. Allegheny Int'l Inc.,* 850 F.2d 1217, 1225 (7th Cir. 1988). Amending a complaint to add a corporate officer as a respondent constitutes a substantive new claim that may require additional fact-finding and investigation and presentation of new theories. *Carroll Oil,* 2002 EPA App. LEXIS 14 * 41. Undue prejudice has been shown even where the proposed new corporate officer participated in the case against the corporate defendant. *Cartier,* 2004 U.S. Dist. LEXIS 989 (in denying motion to amend to add corporate officers as defendants, court considered that motion was filed after discovery was complete, officers had prolonged reliance on the case being based on corporate liability and had prepared for trial on that basis); *Sizemore v. Lil Preast Sewing and Designs,* Civ. No. 92-1178, 1992 U.S. App. LEXIS 29823 (4th Cir. 1992)(Motion to amend to add as defendants corporate officers involved in the case against the corporate defendant was denied where they had no notice to prepare their own defenses for trial, three years had elapsed since the original complaint was filed, and judgment had been entered and damages assessed against the corporation).

Matters of prejudice and avoidance of undue delay may constitute sufficient, independent reasons for denying an amendment to a complaint. *Carroll Oil,* 2002 EPA App. LEXIS 14 n. 17. Yet they are often related, as it has been held that the crucial factor is not the length of the delay but whether prejudice would result. *United States v Pend Orielle Public Utility District No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991). The longer the unexplained delay, the less that is required of the nonmoving party to show prejudice. *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1993). Not only should the burden to the opposing party be taken into account, but also the burden to the court from protracted litigation which harms the other litigants who must wait longer in the court queue. *Carroll Oil,* 2002 EPA App. LEXIS 14 * 42.

Delay does not justify denial of a motion to amend a complaint to add individual defendants where discovery is not significantly affected or trial is not imminent. *Banco Central de Paraguay v. Paraguay Humanitarian Foundation,* Civ. No. 01-9649 (JFK)(FM), 2003 U.S. Dist. LEXIS 11584 (S.D. NY July 8, 2003)(no undue prejudice found where claims against individuals are same as those against principal defendants, even where individuals need to retain counsel and take time to "get up to speed" in the case, where additional discovery may not be needed, and motion to amend was filed twenty months after original complaint); *Randolph-Rand Corp. v. Tidy Handbags, Inc.*, Civ. No. 96-1829 (LMM)(DF), 2001 U.S. Dist. LEXIS 17625 * 12 (S. D. NY, Oct. 24, 2001)(no undue prejudice where proposed new claims against individuals, filed five years after the complaint, are identical to those against corporation, defendants did not show how amendment would materially affect the duration or scope of discovery, which was far from complete, no trial date had been set, and progress in the case was "halting at best"). Motions to amend may be denied on the basis of undue prejudice, however,

where the motion is filed close to commencement of trial and after discovery is complete. *Competition Specialties, Inc. v. Competition Specialties, Inc.*, 87 Fed. Appx. 38, 43, 2004 U.S. App. LEXIS 819 (9th Cir. 2004)(undue prejudice found where motion to add corporate officers to complaint was filed one and a half years after the complaint against the corporation was filed, after the close of discovery, and two months before trial).

The movant has the burden to provide a satisfactory and valid explanation for the delay in including the individuals as defendants. *Cartier*, 2004 U.S. Dist. LEXIS 989. Explanations for the delay have been found insufficient or invalid where the facts and theory for relief against corporate officers were known at the time of the initial complaint or significantly earlier in the proceeding. *Id.* (n denying motion to amend, court considered motion was filed two years after original complaint and one year after complaint was previously amended, and movant's assertion that it only recently learned the defendant corporation was going to be bankrupted was not substantiated)*; Carroll Oil*, 2002 EPA App. LEXIS 14 (in denying motion to amend to add corporate president as respondent, tribunal considered that EPA knew when answer was filed that he was corporation's principal). Allegations of newly discovered evidence do not justify the delay in filing a motion to amend where sufficient evidence in support of the amendment was known previously to the movant. *Profile Racing v. Profile for Speed*, Civil No. 93C 5175, 1995 U.S. Dist LEXIS 13187 * 3-4 (N.D. Ill., Sept. 8, 1995)(motion to amend complaint to add as defendant the Chief Executive Officer of corporate defendant, filed two years after initial complaint and one year after prior amendment to complaint, denied as untimely where plaintiff did not cite any newly discovered evidence to justify its delay; plaintiff had all information it needed to amend a year before). Thus, courts have not been sympathetic to movants who wait unnecessarily for additional confirmation that their proposed amendment is well-founded. See, *Evans v. Syracuse City School District*, 704 F.2d 44, 47 (2nd Cir. 1983)(attempt to justify undue delay by the "unsettled" state of the law, on basis that res judicata defense was not ripe until Supreme Court issued a decision, was unsuccessful where authority previously existed for the particular application of res judicata).

A proposed amendment is futile if it could not withstand a motion to dismiss. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2nd Cir. 2003); *Hall v. United Insurance Co. of America*, 367 F.3d 1255, 1263 (11th Cir. 2004). If there is a colorable basis for the amendment, it is not futile. *Cartier*, 2004 U.S. Dist. LEXIS 989.

IV. Discussion and Conclusion

Complainant has set out a colorable claim of Mr. Krimmel and Mr. Turgeon as respondents in this case, on the basis that they were "operators" of a hazardous waste treatment, storage or disposal (TSD) facility. One or more individuals as well as the corporation may be "operators" where these individuals have responsibility for the overall operation of the facility. *Southern Timber Products, Inc.*, 3 E.A.D. 880, 892 (JO 1992). Factors that have been considered as to whether a person is an "operator" of a TSD facility are his role in the corporation, percent of ownership of stock in the corporation; authority to hire, fire and control

employees; degree of presence at the facility; involvement in the activity at issue; authority in making financial decisions for the facility; involvement and authority in decisionmaking as to the facility's operation and compliance with laws and regulations at issue; authority and control over the facility; authority in making decisions as to consultants; delegation of responsibility to others; documents submitted to EPA identifying the individual as facility operator and not just corporate representative; and personal liability under a lease of the facility. *Id.* at 894-895 (citing *Wisconsin v. Rollfink*, 33 Env't Rep. Cas. (BNA) 1507 (Wis., May 23, 1991); *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989, *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert denied*, 59 U.S.L.W. 3724 (April 22, 1991)). As stated in *Southern Timber*, 3 E.A.D. at 895-896, "an officer of a corporate operator should be found to have 'co-operator' status where the officer exercises active and pervasive control over the overall operation of the facility." Complainant has alleged several facts and cited to documents in the Prehearing Exchange in support of a finding that Mr. Krimmel and Mr. Turgeon are such "operators." Therefore, the proposed amendment is not futile.

There is nothing in the case file that suggests that Complainant filed its Motion in bad faith or with a dilatory motive. The remaining issues are whether Complainant unduly delayed in filing the Motion and whether the opposing parties, Zaclon, Mr. Krimmel and Mr. Turgeon, would be unduly prejudiced by the proposed amendment.

Although the Motion was filed on the due date for prehearing motions, it was filed almost one and a half years after the initial Complaint was filed, seven months after the prehearing exchange as to Count 1 was completed, four months after the Second Amended Complaint was filed, one month after supplemental prehearing exchanges as to Count 2 were submitted, and less than three months before the hearing was scheduled to commence.

Complainant's explanation of its delay in seeking to add Mr. Krimmel and Mr. Turgeon as respondents is not persuasive, particularly considering the case law cited above. Time spent in Alternative Dispute Resolution (ADR) with Respondents does not excuse any such delay, as ADR was terminated nine months prior to the date the Motion was filed. The suggestion in its Prehearing Exchange that Complainant was *considering* amending the Complaint to add Mr. Krimmel and Mr. Turgeon as operators of the facility would not suggest that they must immediately retain counsel and prepare their defenses for the hearing. Complainant asserts that it investigated to confirm that they exercise "untrammeled, plenary command and control of all Zaclon's operations," but does not cite to or present any documents resulting from that investigation which would indicate new evidence upon which Complainant relied for its proposed amendment. Instead, Complainant cites to information in the Prehearing Exchange, filed seven months before the Motion, and to a response, dated April 25, 2002, to EPA's information request. Therefore, sufficient information to support the proposed amendment was known by Complainant significantly earlier in this proceeding.

Complainant does not allege any inability to obtain relief if its Motion is denied. However, the existing and proposed Respondents would suffer prejudice if the Motion is granted. It is likely that the parties would need to supplement their Prehearing Exchanges to

address the disputed issues as to the control of Mr. Krimmel and Mr. Turgeon over Zaclon's activities, including factors discussed in *Southern Timber Products*. As stated by the EAB, "the general issue of corporate officer liability under RCRA is a factually sensitive matter that requires investigation into the nature and extent of the role played by the corporate officer." *Thermex Energy Corp*., 4 E.A.D. 68, 70 (EAB 1992). The supplementation of Prehearing Exchanges, and any motions related to the proposed amendment that may be filed, would increase costs and burdens to the existing and proposed Respondents, and may result in a further postponement of the hearing currently set to begin on June 6, 2006, approximately six weeks from now. [2]

It is concluded that, considering the delay and undue prejudice, Complainant has not met the standards for amending the Complaint to add Mr. Krimmel and Mr. Turgeon as respondents. Accordingly, Complainant's Motion for Leave to File Third Amended Complaint is **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Date: April 21, 2006
Washington, D.C.

[2] Particularly in administrative tribunals, it is important to ensure the efficiency of proceedings. *See*, 40 C.F.R. § 22.4(c)(10)(Administrative Law Judge's authority to "take all measures necessary for the maintenance of order and for the *efficient*, fair and impartial adjudication of issues arising in proceedings")(emphasis added); 5 U.S.C. § 555(b)(With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.") This hearing was recently postponed a few weeks due to the overcrowding of the undersigned's hearing calendar and to allow time for the undersigned to rule on this motion and adequately prepare for the hearing in this case.

In the Matter of Zaclon, Incorporated, Zaclon LLC & Independence Land Development Company, Respondents
Docket No. RCRA-05-2004-0019

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Leave To File Third Amended Complaint**, dated April 21, 2006, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale

Dated: April 21, 2006

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